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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1070

**JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,**

Petitioner,

vs.

**THE PENNSYLVANIA RAILROAD COMPANY,**

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI.

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*May it Please the Court:*

### Statement of Matter Involved.

Petitioner respectfully represents to the court that she recovered a verdict and judgment in the District Court for the Northern District of Indiana, in the sum of Seventy Five Hundred ($7500.00) for the wrongful death of her husband. Jurisdiction was based upon diversity of citizenship. By two to one decision, this verdict and judgment were reversed generally and without direction (Tr.

1 & 2) by the United States Circuit Court of Appeals for the Seventh Circuit, because the evidence showed that your petitioner's husband was guilty of contributory negligence as a matter of law. *Josephine Moss, Administratrix* v. *The Pennsylvania Railroad Company,* 146 F. 2d 673. (See opinion in appendix). A petition for certiorari was denied by this court on May 21, 1945. *Josephine Moss, Administratrix* v. *The Pennsylvania Railroad Company,* 325 U. S. 861, 65 S. Ct. 1200. Without a further trial and on motion of the defendant (Respondent) the District Court entered judgment upon remand in favor of the defendant (Tr. 4-6 inc.). On further appeal this action of the District Court was affirmed with opinion (Tr. 21-22). (Opinion printed in appendix). It is this decision which your petitioner assigns as error, and earnestly prays that this court issue a writ of certiorari to review.

**Jurisdiction to Review.**

Your petitioner respectfully represents further that this court has jurisdiction to review the judgment in question under Section 240 (a) of the Judicial Code as amended by Act of Congress under date of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 350. The judgment complained of also involves what your petitioner earnestly contends to be an erroneous construction of Rule 50b of the Federal Rules of Civil Procedure.

The judgment sought to be reviewed was rendered on November 6, 1946 (Tr. 23). A petition for rehearing was duly filed on November 21, 1946 (Tr. 23) and denied on December 3, 1946 (Tr. 24). This petition is being filed within three months after the judgment (deducting the period during which the time for the filing of this petition was suspended by the pendency of the peti-

tion for rehearing). *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498, 48 S. Ct. 112. The judgment of the Circuit Court of Appeals was final and may be reviewed by certiorari. *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 22 S. Ct. 252.

Petitioner further states that the questions involved are of peculiar gravity and of general importance to the practice. The judgment of the District Court, as affirmed by the Circuit Court of Appeals, in a purported effort to avoid re-trials, has gone to extremes not yet found in the written opinions, in holding that a general reversal of a verdict and judgment authorizes the District Court to peremptorily enter judgment in favor of the losing party upon remand without a jury trial. Again, *Rule* 50b of the Federal Rules has been before this court often in recent years for clarification, but the decisions of the Circuit Court of Appeals have been reversed in each instance upon other grounds, and without passing upon the procedural matters involved. *Conway* v. *O'Brien,* 312 U. S. 492, 61 S. Ct. 634, *Berry* v. *U. S.,* 312 U. S. 450, 61 S. Ct. 637, *Halliday* v. *U. S.,* 315 U.S. 94, 62 S. Ct. 438. The instant case clearly demonstrates the very important need for further clarification of the Rule: Assuming the Circuit Court had power to direct the entry of a judgment in favor of the losing litigant in a jury case but failed to do so—does the District Court succeed to that power on general reversal and remand without specific delegation because of *Rule* 50b?

Appended hereto are the relevant opinions of the District Court and the Circuit Court of Appeals.

## Questions Presented.

Your petitioner represents that there is substantially only one question presented: The error of the Circuit Court of Appeals in affirming the action of the District Court in entering judgment for the defendant, upon motion, in a jury case without a further trial after a general reversal and remand without direction of a verdict and judgment in favor of the plaintiff (your Petitioner).

## Reasons for Allowance of Writ.

Petitioner submits the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals for the Seventh Circuit in deciding a federal question ignored at least two ruling precedents of this court, namely; *Slocum* v. *New York Life Insurance Company,* 228 U. S. 364, 33 S. Ct. 523, and *Rodgers* v. *Hill,* 289 U. S. 582, 53 S. Ct. 731.

2. The decision in question is in direct conflict with the decisions of other Circuit Courts of Appeal, and particularly the decision of the Circuit Court of Appeal for the Eighth Circuit in *Illinois Power & Light Corp.* v. *Hurley* (1931) 49 F. 2d 681. Also *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942) 127 F. 2d 837 (5th C.C.A.); *Fleniken* v. *Great Amer. Indemnity Co.,* (1944) 142 F. 2d 938; (5th C.C.A.); *Roth et al.* v. *Hyer* (1944) 142 F. 2d 227 (5th C.C.A.).

3. The decision of the Circuit Court of Appeals has sanctioned so far a departure from the usual course of judicial proceedings by a District Court as to call for an exercise of this court's power of supervision. The District Court interprets Rule 50b of the Rules of Civil Procedure to mean that where a verdict and judgment have been reversed generally and without express direc-

tion, there is an implied direction that a motion *non obstante veredicto* made prior to the appeal and denied should be reinstated, reconsidered, and sustained without further consideration. The only remedy in practice for such an interpretation of *Rule* 50b is for the prevailing party in a jury case to file a motion for new trial and assign cross-errors on appeal. In other words, such a party must impeach a verdict in his favor in order to avoid the otherwise fatal consequence of a general reversal without direction.

This procedure, upon close inspection, would be futile from the standpoint of practicing attorneys charged with the primary responsibiilities to the litigants, and, who, prior to these decisions, understood a "general reversal" to mean just that.

4. The decision of the District Court as affirmed by the Circuit Court of Appeals places a new and erroneous construction on *Rule* 50b of the Federal Rules of Procedure. While recent decisions have held that the reviewing court has power to direct judgment in favor of the losing party in the court below in a jury case under *Rule* 50b, the decision sought to be reviewed goes further in holding that where the reviewing court has not exercised this power it is re-delegated back to the trial court after reversal.

5. Your petitioner has been deprived of her constitutional right to a jury trial. A general reversal without direction places the case back before the trial court as though no trial had occurred. While the trial court is bound by the law established on appeal as it applies to the second trial, it cannot ignore the right to a jury determination upon the disputed facts involved, and forth-

with enter complete and final judgment against the plaintiff and in favor of the adversary.

## Conclusion.

Wherefore, your petitioner respectfully prays that her petition be granted, and that a writ of certiorari issue, pursuant to this petition, to the Circuit Court of Appeals for the Seventh Circuit directing it to send up the record of the proceedings had there in this cause for review by this Honorable Court.

Josephine M. Moss, Administratrix of the Estate of Nicholas John Moss, Deceased,

By: Owen W. Crumpacker,
Jay E. Darlington,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

---

*May it Please the Court:*

### Official Reports.

The opinion and judgment in the first appeal appears in 146 F. 2d 673. The District Court's memorandum opinion appears in the printed transcript filed in this court at pages 4 to 6, inclusive, and 68 F. Supp. 740. The opinion of the Circuit Court of Appeals in the second appeal appears in 158 F. 2d 86. For the convenience of the court these three opinions are set forth *verbatim* in the appendix to this petition and brief.

**Concise Statement of Jurisdiction.**

The concise statement of this court's jurisdiction appears in the formal petition, *supra.*

**Specification of Errors.**

The only error specified appears in the formal petition under "Questions Presented", *supra.*

## ARGUMENT.

### Conflict with Precedents of This Court.

Petitioner has consistently argued that the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, has never been overruled in so far as it authorized and required a new trial in the District Court after the general reversal of the verdict and judgment originally rendered in your petitioner's favor. Respondent in appealing from the adverse decision assigned numerous specifications of error including the denial of its motion *non obstante veredicto* and the denial of its motion in the alternative for a new trial.* All it sought on appeal was a general reversal. In granting this prayer the Circuit Court of Appeals quite obviously was concerned in its opinion (see appendix) only with the question of the contributory negligence of petitioner's decedent, the negligence being admitted. Its mandate di-

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* Your petitioner takes exception to the Circuit Court's statement in the second appeal that "*the error assigned* was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict" (Tr. 21). Such a mis-statement tends to support the District Court's action by smothering the actual fact that there were fourteen separate and independent errors assigned in the initial appeal including the overruling of defendants' motion for a new trial. While the specifications of error appear only in the transcript in the first appeal, which, perhaps, is not before this court, except by judicial notice, the specifications of error do appear in the transcript in Cause No. 1182 (Oct. Term 1944) in this Court at pages 237 to 247, inclusive.

rected "such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding" (Tr. 2). Thereupon the trial court entered final judgment (Tr. 5). That the *Slocum* case was completely ignored can be readily seen by a cursory reading of the attached opinions.

In so far as the *Slocum* case pertains to the effect of a general reversal without direction, we quote the following language of Mr. Justice Van Devanter appearing therein (33 S. Ct. page 537):

> "That judgment the Circuit Court of Appeals reversed and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. *The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given.*" (Italics ours.)

In substance the court decided that the Circuit Court of Appeals had no authority to direct judgment for the defendant, and that the Seventh Amendment of the Constitution made a new trial mandatory. This opinion was modified in *Baltimore and Carolina Line* v. *Redman, Inc.*, (1935) 295 U. S. 654, 55 S. Ct. 890, in so far as the power of the Circuit Court of Appeals to direct a judgment of dismissal under the particular circumstances was involved, Mr. Justice Van Devanter again writing the opinion. Pursuant to this modification placed upon the rule in the *Slocum* case, *supra*, the court later held in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, that *Rule* 50b merely rendered unnecessary a request for the reservation of the question of law on a motion for a directed verdict. It decided that in all cases brought under the new rules the reservation of the law question was automatic, and that,

therefore, from a procedural standpoint, all cases came within the rule of the *Redman* case, *supra*. In effect it decided that the appellate court has two alternatives, 61 S. Ct. at page 195:

> "The appellate court may reverse the former action and itself enter judgment *n. o. v.* or it may reverse and remand for a new trial for errors of the law."

In the instant case respondent neither waived nor withdrew its motion for a new trial, nor did it elect to stand only upon its motion *n. o. v.* on appeal. The Circuit Court of Appeals decided that on all of the evidence, the decedent was guilty of contributory negligence. However, it followed neither of the alternatives authorized in *Montgomery Ward & Company* v. *Duncan, supra*. Therefore we contend that pursuant to the unmodified portion of the *Slocum* decision, the case on remand rested as though no trial had occurred, and the District Court was bound to set it for trial upon its trial calendar instead of summarily entering judgment for respondent.

It is contended further that the decision in *Rodgers* v. *Hill* (1933) 289 U. S. 582, 53 S. Ct. 731, has also been ignored. We merely quote the pertinent part of that decision regarding the construction of mandates (53 S. Ct. p. 734):

> "Moreover, if the court intended to direct dismissal, it is presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showings made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his bills of complaint. (Citing authorities)."

The absence in the opinion and mandate of the appellate court of any direction to enter judgment for the respondent is particularly significant when regarded in the light of the quoted language, and the full powers given courts of review under *Rule* 50b.

**Conflict Among Circuit Courts of Appeal.**

Prior to the enactment of the Federal Rules of Civil Procedure the Circuit Court of Appeals for the Eighth Circuit held in the case of *Illinois Power and Light Corp.* v. *Hurley* (1931) 49 F. 2d 681, at page 683 that:

> "The action being one at law the reversal of the judgment entitled the parties to a new trial of the action without restriction or limitation * * * This court, in reversing the prior judgment, did not purport to place any such conditions or restrictions upon plaintiff, and the trial court had no authority to require plaintiffs in a preliminary hearing before the court without a jury, to prove that they had a case for the jury."

An examination of this case reveals a trial and appellate history identical with the case at bar. In its opinion in the instant case (see appendix) the Circuit Court of Appeals neither analyzed, nor distinguished, nor even referred to the existence of such law, although it is a clear enunciation of a well recognized and uncontradicted rule.

After the adoption of the new rules the Circuit Court of Appeals for the Fifth Circuit rendered three opinions in accordance with the rule of the *Hurley* case, *supra; Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942), 127 F. 2d 837; *Roth* v. *Hyer* (1944), 142 F. 2d 227, and *Fleniken, et al.* v. *Great American Indemnity Company* (1944), 142 F. 2d 938. Of these three cases, the current opinion of the Circuit Court of Appeals refers only to the *Madden Furniture* case, and then only to

quote a portion of the language of the decision not applicable to the question before it. It ignored the fact that the decision required a trial of the case *de novo*, and that the motions for judgment were held not reinstated, but stood disposed of.

In *Roth* v. *Hyer, supra,* the court said at page 228:

> "Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinion of the appellate court which must be regarded as the law on the second trial."

In the *Fleniken* case a verdict was reversed because a motion for a directed verdict should have been granted. On remand the court entered judgment for the defendant. On further appeal the court held that the District Court erroneously construed the mandate, and that plaintiff was entitled to ask for a trial *de novo*. With this decision in mind we call the court's attention to the statement of the District Court in the present case from which we quote as follows (Tr. page 5):

> "In that connection the plaintiffs argue that they should be given the opportunity to adduce additional evidence to supply the deficiency found by the Appellate Court, or to explain away the evidence found to bar the one plaintiff's recover. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded."

There can be no question but that the decisions mentioned above clearly establish the right of your petitioner to a new trial upon the general reversal of her verdict

and judgment; or, at least, her right to present to the District Court considerations which might warrant the granting of a new trial, if it be regarded as a discretionary matter. Not only has the Circuit Court of Appeals ignored the decisions cited, but it has failed to cite a single authority to the contrary among the ten authorities mentioned.

Its decision, therefore, stands alone and in direct conflict with the cases discussed.

**Departures in Procedure.**

The District Court without anything before it other than the mandate and opinion of the reviewing court summarily entered judgment in favor of the defendant upon its motion (Tr. 6). Since the mandate contains no express direction, the only theory to sustain its action is that there was an implied direction to so enter judgment. The Circuit Court of Appeals sanctioned this so-called direction by implication:—"We think the court correctly construed the opinion and mandates and properly disposed of appellants' contentions" (Tr. 22). But there was nothing before the court upon which it could act affirmatively under the then existing procedure. The motion for judgment *n. o. v.* was not re-instated by the reversal but stood disposed of. *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co., supra.* As stated in *Fleniken* v. *Great American Indemnity Company, supra,* at page 939:

> "The reversal on appeal of said final judgment, with a remand for further and not inconsistent proceedings, did not reinstate the motion of the defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken."

The decision sought to be reviewed is, thus, a substantial departure from existing practice.

A further departure of a substantial nature is sustained by the opinion of the Circuit Court of Appeals. Petitioner was apparently penalized, as reflected in the opinion, because she "made no offer to produce any evidence not before heard" (Tr. 22). The Circuit Court also stated: "Comparing *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.* * * * after the mandate had been filed appellants offered to exhibit evidence not before heard which might produce a different result" (Tr. 22).

With regard to the *Madden* case the Circuit Court merely seized upon a statement from the reviewing court's resume' of the facts to justify its affirmance here, because the court in the *Madden* case makes no comment in the body of the opinion upon the propriety or impropriety of such a preliminary showing. That your petitioner was between "Scylla and Charybdis" is shown by the trial court's views in the matter:

> "In that connection plaintiffs argue that they should be given the opportunity to adduce additional evidence * * * to explain away the evidence found to bar plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded" (Tr. page 5).

The prior written law on this subject is clearly stated in *Illinois Power and Light Co.* v. *Hurley, supra,* pages 683 and 684:

> "The defendant however interposed a motion to dismiss, unless plaintiffs should show that they had available additional noncumulative evidence, pertinent and substantial and newly discovered, and un-

> obtainable at the time of the prior trial. • • • Counsel cite new authority for such a procedure, and we conclude that there is none. Such a procedure would seem to be in direct violation of the Seventh Amendment of the Constitution. (Citing *Slocum* case and others) • • • the trial court had no authority to require plaintiffs, in a preliminary hearing before the court and without a jury, to prove they had a case for the jury. The motion was not only unique but, we think *was properly treated as frivolous.*" (Italics ours.)

As mentioned, a fair interpretation of the opinion in the first appeal is that the District Court erred in its denial of the motion for a directed verdict as re-urged in the motion *n. o. v.* and in the alternative the motion for new trial, although the court in the majority opinion did not refer to any specific rulings. That there was a substantial difference of opinion, even in the reviewing court, is indicated in the dissenting opinion. The trial court, at least, was satisfied that a fair trial had been had, and that the verdict was in accordance with the weight of the evidence, since it denied defendant's motion for new trial as well as the motion *n. o. v.* (Tr. 4).

The above suggested procedures present baffling problems to practicing attorneys in the trial courts. Apparently, a successful litigant must impeach a favorable verdict and judgment to insure against a general reversal because the only provisions for a motion for new trial (Rules 50b & 59) (in which the prejudicial rulings of the court could be urged) requires it to be filed within ten days after verdict or judgment. The pre-jury presentation of evidence after a general reversal would lead to so many ramifications as to make it futile upon its face.

**Erroneous Construction of Rule 50b.**

Without setting out the terms of the rule, its apparent primary purpose is to permit the trial court to reflect upon the merits of a plaintiff's case after the immediate problems arising during the actual trial have been disposed of. (See Rule 50b, appendix.) By judicial interpretation this rule has given the reviewing court power to finally dispose of jury trials where the interests of justice so require. The decision in the present case construes the rule to permit the redelegation of that power back to the trial court. The result is apparent. It then becomes an instrument for the prevention of re-trials—whether necessary, meritorious, or otherwise—depending upon the pressing nature of the particular court's calendar at the time the problem arises.

**The Seventh Amendment.**

As so ably stated by the late Mr. Justice Van Devanter in the *Slocum* case, *supra,* the constitutional right to a trial by jury of issues of fact in civil cases has always been guarded with jealousy by this Honorable Court. The committee of judges and lawyers that recommended the adoption of *Rule* 50b by this court was fully aware of its possible abuse in so far as the denial of the right to a jury trial was concerned. * The record and opinions sought to be reviewed here present a most clear illustration of that feared abuse.

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* See order of this court under date of June 3, 1935, October Term, 1934, appointing advisory committee.

## Conclusion.

Your petitioner is not seeking to re-argue the evidence in her case in this court. She has brought to this Honorable Court's attention an ignoring of precedents by the Circuit Court of Appeals for the Seventh Circuit, a conflict of decisions among the circuits, wide departures in the practice not heretofore sanctioned, a new and erroneous construction of the Federal Rules of Procedure, and a violation of the Constitution by judicial decision, all of which pertain to a question of procedure and practice of grave and general importance to the bench and bar.

For all of which reasons, your petitioner prays that her petition be granted.

Josephine M. Moss, Administratrix
of the Estate of Nicholas John
Moss, Deceased,

By Owen W. Crumpacker,
Jay E. Darlington,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

# APPENDIX.

IN THE

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8549 October Term and Session, 1944.

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,
Plaintiff-Appellee,
vs.
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

January 3, 1945.

Before EVANS, KERNER, and MINTON, Circuit Judges.

This appeal necessitates our determination of liability for the death of Nicholas J. Moss, who was killed when the automobile he was driving was struck by defendant's fast moving train at a crossing in the incorporated town of Shererville, Indiana. The administratrix of his estate brought this action to recover damages for his death, allegedly caused by defendant's negligence. Defendant denied negligence and charged deceased with want of ordinary care, which caused or at least contributed to the accident and to his death.

The trial court submitted the case to a jury, who returned a verdict for plaintiff. The entry of a judgment on the verdict provoked this appeal.

EVANS, Circuit Judge. We approach the case on the hypothesis that where the sufficiency of the evidence to support the verdict is the only controverted issue, only evidence most favorable to the plaintiff will be considered. Likewise narrowing the fact study is our acceptance of plaintiff's evidence as sufficient to establish her charge of negligence on defendant's part.*

Thus narrowed, our only inquiry is one of contributory negligence.

The accident occurred about 3 P. M., December 6, 1941, on a somewhat dark, but stormless day. The deceased drove his automobile along the Austin highway from the south, on to defendant's right of way, and in front of an oncoming train. In doing so he was struck and fatally injured. He never regained consciousness although he lived several days.

Ordinarily, this simple undisputed factual statement would settle the question of liability. Unexplained, the facts establish contributory negligence as a matter of law. Plaintiff, however, offers an explanation of deceased's conduct. At least an attempt to do so is made. It is based on the theory of an unobstructed view of the oncoming train. The nature of the alleged obstruction and its effect as an excuse for the deceased's action, therefore, become the precise question of our inquiry.

That an obstruction of the view of a rapidly moving train may explain or excuse the traveler from what would otherwise be negligence, is not debatable. *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98.

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* Four witnesses testified that the whistle on the engine was blown. Two witnesses testified that they did not hear any whistle.

The query then is, What are the facts in the instant case? In an effort to answer this query, we have assumed:

(a) In applying the law, each case must be determined by its own facts.

(b) The law as announced by the Indiana state courts, governs.

(c) The controversy here, as in most personal injury cases, is not over the applicable law, for the decisions are quite uniform, but involves a study of the facts peculiar to this case and the application of settled Indiana law thereto.

Controversy, if any, must spring from an attempt to ascertain the undisputed facts and supplement them by the controverted facts construed by us most favorably to the plaintiff.

Here reproduced are two photographs.

One shows the situation at the crossing where the accident occurred. The other is a view of the railroad right of way and the tracks as the traveler approached the crossing. It purports to show the distance (a mile) the traveler, approaching from the south, could see down the railroad right of way, and also to show the absence of any obstruction, when the photographer stood forty-four feet from the nearest rail over which train moved.

The only possible dispute is over the number of feet the photographer stood south of the track.

The evidence is that as the deceased continued his way along the Austin highway and approached the railroad right of way, he reached a point where there was some obstruction to his view. To his right, a rise of land, referred to as a mound or knoll, partially obstructed the

view. It was several feet high (maximum of 9 feet) and upon it grass had grown. It extended parallel to the right of way about two hundred feet and was about a hundred feet wide. Measurements vary, because of difference over place where land begins to rise.

The knoll did not completely obstruct the view of an oncoming train from the south, however, and one riding in an automobile on the road could see the top of the train over the top of the knoll. The extent of the obstruction when the traveler is behind the mound is not the determining factor in the defense of contributory negligence, however. As the traveler approached the track, he reached a point where the obstruction, or partial obstruction, to-wit, the mound or knoll, no longer interfered with a traveler's view of the track or an oncoming train. As the mound subsided and the land became level again, nothing obstructed the view.

The exact distance which marks this spot where clear vision began, thus becomes the important and determinative question in the case.

Counsel do not agree upon the distance such spot was from the railroad tracks. Both do agree, and must agree, that there was such a spot, which the deceased reached before he came to the tracks—a spot where he could clearly see the oncoming train. Not only the testimony but the photographs, establish this fact as a verity. There is no controversy, either, as to the general correctness of the photographs, once the traveler reached the point where he could look down the track.

Actual measurements were taken by witnesses for the defendant and their testimony is undisputed, save by one witness upon whom plaintiff relies to make the question one for the jury. He gave it as his estimate, based upon an observation after the accident, that it was from

twenty to thirty feet from the south rail of the track traveled by the train. The measurements given by the other witnesses were as follows: At forty-four feet from the track, the traveler could see the overhead bridge a mile away. The photograph, so they said, was taken with the photographer forty-four feet from said rail.

Placing the camera in the center of the road, fifty-five feet from the south rail, a man standing in the center of the track in question, could be seen six hundred seventy feet from the crossing. The same test was made at fifty feet from the same rail and the man could be seen nine hundred thirty-five feet down the track. At forty-four feet one could see as far as his sight would permit. The overhead bridge, a mile away, was observable.

The factual issue which is determinative of the case then, is the distance from the track to a spot where deceased's view was still unobstructed. That there was such a spot is certain.

The various witnesses who made the measurements fixed that point at a distance from the said rail, considerably more than the estimate of the one witness for the plaintiff, who approximated it at twenty to thirty feet.

The testimony of plaintiff's witness is important and we quote it:

> "Question * * * When you came up to 55 and 45 feet from the north track there, * * * I will ask you whether or not it is not a fact that you can pass the corner of the knoll and you have a view way down the track to the east.
>
> "Answer: Yes, at some point there you can see the train coming at some distance.
>
> "Question: What point, and what distance?

"Answer: At a point I would say about 30 feet, 20 to 30 feet probably before you approach the track, I made no exact measurements as to distance. I am not sure as to the number of feet that it takes for you to see down this track. I never made any measurements."

The testimony of this witness and those who made the actual measurements may not be said to be in conflict. The testimony of one who estimates and allows for a range of ten feet is reconcilable with an actual measurement of 44 feet. So accepting it, we have the deceased traveling in a car at a rate of ten to fifteen miles an hour, approaching a railroad track, the existence of which he knew, without stopping. The approaching train composed of two engines and thirteen passenger cars and traveling seventy miles per hour, was a few hundred feet away. Yet he drove on the track in front of the oncoming train.

Either he was in hopes that he would get across the track before the engine reached the spot, or he did not look to the right as he approached the track. That he could have stopped before he reached the track, in twenty feet, is, we believe, a matter of common knowledge.

The Indiana statute has imposed an additional duty upon the traveler. It does not make the action of the ordinary man the test of the traveler's duty. It mandatorily called on the traveler to stop when approaching a crossing. The evidence of all witnesses who saw deceased approach the track was that the deceased did not stop.

The statute, omitting inapplicable provisions, reads:

"47-2114. Obedience to Signal Indicating approach of train.—Whenever any person driving a

vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and shall not proceed until he can do so safely, when:

"(a) • • •

"(b) • • •

"(c) • • •

"(d) An approaching train is plaintily visible and is in hazardous proximity to such crossing."

The deceased failed to comply with this statute. His failure to stop is a violation of the statute somewhat similar to defendant's action in driving its train faster than fifteen miles through this town. Defendant's violation of the town's speed ordinance established negligence on the part of the defendant. Plaintiff's failure to comply with the statute carried like consequences. At least we find it hard to escape this reasoning. We are not the judge of the wisdom of this rather harsh statute. Its wisdom is for the Indiana Legislature. Moreover, its scope and effect are for the Indiana courts. As we read, construe, and apply it, a serious obstacle has been erected by it in plaintiff's path to recovery.

We are, however, not placing our decision upon this statute. There seems to be uncertainty in Indiana courts as to this statute's proper construction and application. We ignore it because as we view the evidence we must reach the same conclusion without relying on it.

Ignoring this statute, it still seems to us clear that deceased should have stopped, rather than have driven on the track in front of the engine.

In reaching this conclusion we are taking the most favorable and charitable view of deceased's action, namely, that he did not endeavor to race with the engine, but rather that he failed to look and therefore failed to

see the oncoming train. We are accepting the estimate of plaintiff's witness rather than the measurements of defendant's witnesses, solely on the theory that it is the testimony most favorable to plaintiff that can be found in the record.

He should have looked. He must be charged with the information which he would have received had he looked.

There is one fact thus far not mentioned, which plaintiff has properly stressed and which we have not overlooked. The railroad tracks and the highway did not cross at right angles. The highway ran north and south. The railroad right of way ran southeast and northwest. The train which struck Moss was coming from the southeast at an angle of about forty-five degrees. To have seen it coming the deceased would have had to turn his head further than if it crossed at right angles. The train was obviously, clearly and warningly observable. The duty of the traveler was to look, not merely at right angles, but down the path of the right of way. He can not be excused for not looking as he approached the railroad double track with intent to pass over it. Had he looked he could not have failed to see the train. As it traveled the last six hundred feet before reaching the crossing, it was almost as clearly observable as if the tracks ran at right angle to the highway. The photograph supports common observation in making this statement.

The conclusion which we have reached seems to us to be unavoidable. Deceased drove his automobile out in front of an oncoming train which he must have seen had he looked. He met the inevitable fate which such action forecast. The accident is distressing, most unfortunate, but liability must be measured by the facts.

The judgment is Reversed.

Kerner, C. J. Dissenting.

The accident occurred at the Austin Avenue crossing, a principal north and south street in the town of Schererville, Indiana, in which town there was in effect an ordinance limiting the speed of railroad trains to 15 miles per hour. This street intersects defendant's railroad, consisting of two tracks extending in a northwesterly and southeasterly direction. The tracks intersect Austin Avenue at an acute angle. The tracks are at road level, but there was a knoll 9 feet above track level upon which there were weeds extending from 1½ feet to 5 feet in height. The knoll was 200 feet long paralleling the track and was 32 feet from the south rail of the westbound or north track. Due to this knoll the vision of a driver coming from the south on Austin Avenue is somewhat obscured. The first view to the right of southeast, obtainable by a person driving north, is from a point 20 feet south of the westbound of northernmost track. (See testimony of Schinourd, page 29, transcript of record.)

It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel other results are more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35.

Photographs are not conclusive to such an extent that evidence in conflict with them will be ignored. They are no more conclusive of physical facts than the testi-

mony of witnesses. It is for the jury to determine their weight and reliability by the same test used in weighing other evidence. *Pettibone* v. *Howard,* 218 Ind. 543, 546. Whether decedent had a view of the approaching train at any time prior to the collision was a disputed question of fact, and where there is conflict between photographs and oral testimony it is within the province of the jury to consider both the photographs and the conflicting oral testimony as well as all other conditions and circumstances shown by the evidence, and its determination is conclusive. *Bartley* v. *Chicago and Eastern Illinois Ry. Co.,* 216 Ind. 512.

Defendant admits that decedent's view to the southeast was partially obstructed by the knoll and that in operating the train at a speed of 65 to 70 miles per hour, in violation of the terms of the town ordinance, it was guilty of negligence. The verdict necessarily found not only that decedent exercised all the care which an ordinarily prudent and cautious person would use under like circumstances and conditions to avoid injury, but it also found that no signal or warning of any kind was given of the approaching train. We must accept as a verity that the first possible view or knowledge the decedent could have had of the approach of the train was when he had arrived at a point 20 feet south of the track upon which the train was approaching.

The courts of Indiana have held that in negligence cases there is no presumption that either party was or was not negligent, and neither courts nor juries have any right to presume any fact in issue which they are called upon to determine, *Pennsylvania R. Co.* v. *Lytle,* 109 Ind. App. 318, 327; *Baltimore & Ohio R. Co.* v. *Reyher,* 216 Ind. 545, 549; and *Heiny* v. *Pennsylvania R. Co.,* 221 Ind. 367, 373. They have repeatedly said that contrib-

utory negligence is a question of fact for the jury, and that it is only in cases where the facts are undisputed and where only a single inference can be reasonably drawn from the facts that the court can say, as a matter of law, that a certain course of conduct does, or does not, constitute contributory negligence, *Cushman Motor Delivery Co.* v. *McCabe,* 219 Ind. 156; *Baltimore & Ohio R. Co.* v. *Reyher, supra;* and *Bartley* v. *Chicago & E. I. Ry. Co., supra.* They have declared as a matter of law that ordinary care requires a person about to cross a railroad track to use his senses of sight and hearing, but they have never said that he must stop or that he must look or listen at any particular place, *Central Indiana Ry. Co.* v. *Wishard,* 186 Ind. 262, and *Bartley* v. *Chicago & E. I. Ry. Co., supra.* He is required to exercise ordinary care to select a place where the act of looking and listening will be reasonably effective, but the point, in its precise relation to the track in feet, is seldom to be determined as a matter of law. *Pittsburgh, etc. Ry. Co.* v. *Dove,* 184 Ind. 447.

It is intimated that decedent was guilty of contributory negligence as a matter of law, in that he failed to stop his automobile within 50 but not less than 10 feet of the crossing, as required by statute. Burns' Ann. St. 1933, 47-2114.

The Supreme Court of Indiana had occasion to discuss an interpret a somewhat similar statute, in which a like contention was made. In that case the court held the case was basically a common-law action; that the decedent's conduct was to be measured by the standard of ordinary care; and that in Indiana no degrees of actionable negligence are recognized other than that which results from the failure or refusal to exercise ordinary care. *Heiny* v. *Pennsylvania Railroad Co.,* 221 Ind. 367.

The burden of proof as to contributory negligence is on the defendant, 2-1025 Burns' Ann. St. 1933. My colleagues are of the opinion that they can say as a matter of law that decedent was guilty of contributory negligence. It seems to me that in reaching this conclusion they overlook and fail to apply the principles enunciated in the cases cited in this opinion.

There was no evidence that decedent was familiar with the crossing. In fact there was evidence tending to prove that he was unfamiliar with the crossing. His conduct was to be measured by the standard of ordinary care, which required him to look and listen. There was no evidence that he was not looking when he was 20 feet from the north track. True it is, he could have seen the approaching train had he looked to the southeast immediately after he had reached a point 20 feet from the north track. But the courts of Indiana have said that the look and listen rule could not be inflexibly applied in all cases, *Stoy* v. *Louisville, etc. R. Co.*, 160 Ind. 144, and that the rule did not require that decedent look or listen at a particular place, in a particular direction, at almost a particular instant of time, irrespective of other conditions. *Cleveland, etc. R. Co.* v. *Lynn*, 177 Ind. 311 318. Consequently, decedent could not be charged with contributory negligence as a matter of law, because he did not look to the southeast immediately before he was struck by the train. *Penn. R. R. Co.* v. *Hemmer*, 206 Ind. 311. Under such circumstances, the question whether decedent was guilty of contributory negligence was for the jury.

Moreover, in this case, decedent was entitled to assume defendant would sound a whistle announcing the approach of the train and that the train would not be operated in violation of the town ordinance, *Chicago, etc.*

*R. Co.* v. *Daun*, 53 Ind. App. 382. No warning was given by blowing a whistle and the train was traveling 65 miles per hour or 93 1/3 feet per second, while the decedent was traveling 10 miles per hour or 14 2/3 feet per second. The failure to sound a whistle and the operation of the train in violation of the town ordinance, together with all the other evidence in the case, were factors to be considered in determining the question of contributory negligence. *Malott* v. *Hawkins*, 159 Ind. 127, 135.

I would affirm the judgment.

(Certificate of Clerk.)

IN THE

# DISTRICT COURT OF THE UNITED STATES

HAMMOND DIVISION

FOR THE NORTHERN DISTRICT OF INDIANA

| | |
|---|---|
| JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased, Plaintiff, vs. THE PENNSYLVANIA RAILROAD COMPANY, Defendant. | No. 397 Civil. |
| DELLA HOOK, Administratrix of the Estate of Jacob Hook, Deceased, Plaintiff, vs. NATIONAL BRICK COMPANY, a corporation, Defendant. | No. 418 Civil. |

## Memorandum Opinion.

Both Moss v. Pennsylvania Railroad Company and Hook v. National Brick Company were actions to recover damages for the deaths of the Plaintiffs' decedents alleged to have been caused by the negligence of the respective defendants, and both cases were tried by jury.

At the close of all the evidence in the Moss case, the defendant railroad company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff upon which judgment was entered.

The defendant then filed a motion for a new trial and in the alternative for judgment on its motion for a directed verdict. This motion was denied.

At the close of the plaintiff's evidence in the Hook case, the defendant brick company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff. The defendant then filed a motion for a new trial and also a motion for judgment *non obstante veredicto*. The latter motion was overruled, and judgment was entered on the verdict.

Both of these cases were reversed on appeal. The defendants now move for judgment on the mandates, but the plaintiffs contend that they are entitled to new trials.

The only question presented is the effect of the mandates; that is, whether, in the absence of direction by the appellate court to enter judgments for the defendants, new trials should be ordered. Plaintiffs' counsel are not contending that the appellate court could not have directed judgments to be entered for the defendants on the record and under the provisions of Rule 50 (b) of the F. R. C. P. Their contention is rather that the simple reversal of the judgments for the plaintiffs does not, in the absence of further mandatory directions, authorize the entry of judgments for the defendants.

In construing the mandate of the Circuit Court of Appeals, the opinion may and should be considered, *Thornton* v. *Carter*, 8 Cir., 109 F. (2d) 316, 319, because it is a part of the mandate. *Pike Rapids Power co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 8 Cir., 106 F. (2nd) 891, 893.

In both the instant cases, the appellants assigned as error the overruling of the motions for directed verdict

and the denial of the motions for judgment notwithstanding. In the Moss case, the appellate court held that as a matter of law the plaintiff's decedent was guilty of contributory negligence, and in the Hook case, it held that "the proof fails to sustain the negligence alleged in the complaint." In other words, the upper court ruled in effect that the District Court should have directed verdicts or should have granted the motions for judgment *non obstante veredicto.*

That being so, when the Circuit Court of Appeals reverses the judgments, it is in effect saying that the rulings on the motions for judgment notwithstanding should be different than they were in the first instance.

It is my view that Rule 50 (b) was included in F. R. C. P. in order that unnecessary retrials may be avoided when the trial court erroneously overrules a motion for directed verdict. In that connection, the plaintiffs argue that they should be given the opportunity to adduce additional evidence to supply the deficiency found by the appellate court or to explain away the evidence found to bar the one plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded.

The plaintiffs have cited *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.*, 5 Cir., 127 F. (2d) 837, as authority for their position. Although one of the alleged errors in that case was a motion for directed verdict, the motion for judgment *non obstante veredicto* was not assigned as error, and the appellate court pointed out in its opinion that it "did not reverse or even review the judgments of the trial judge on the motions for judg-

ment *non obstante veredicto.*" It further said, "The opinion mentions only the alleged errors prior to verdict." This is not the present situation. Here, the motions for judgment *non obstante veredicto* were assigned as error as were the motions for directed verdict, and, in my view, the appellate court reviewed the questions presented by these rulings and then reversed. Under Rule 50 (b), the question of law raised for later redetermination on a motion for judgment notwithstanding. This redetermination was made after verdict in the instant cases, and thereafter the Circuit Court reversed on grounds raised by these motions. Under such circumstances, the question now before the court must be resolved against the plaintiffs.

The Clerk is directed to enter judgments on the mandates in favor of the defendants.

Luther M. Swygert,
Judge.

Moss, Admnx.
v. 9071
Pennsylvania

Hook, Admnx.
v. 9072
National Brick Co.

**Circuit Court of Appeals, Seventh Circuit.**

Appeals from the District Court of the United States for the Northern District of Indiana, Hammond Division; Luther M. Swygert, Judge.

Action by Josephine M. Moss, administratrix of the estate of Nicholas John Moss, deceased, against the Pennsylvania Railroad Company and action by Della Hook, administratrix of the estate of Jacob Hook, deceased, against the National Brick Company, a corporation. From judgments in favor of the defendants, 68 F. Supp. 740, the plaintiffs appeal.

Affirmed.

Owen W. Crumpacker, Jay E. Darlington and Frederick C. Crumpacker, all of Hammond, Ind., for appellants.

Fred E. Zollars, J. A. Bruggeman, and Phil McNagny all of Fort Wayne, Ind. (Barrett, Barrett & McNagny, of Fort Wayne, Ind., of counsel), for Pennsylvania R. Co.

Robert H. Moore (of Moore, Regan & Goad) of Gary, Ind., and William Greene, of Chicago, Ill., for National Brick Co.

Before Major, Kerner, and Minton, Circuit Judges.

*Per Curiam.*

These are second appeals in cases which were before this court in 7 Cir., 146 F. 2d 673 and 7 Cir., 150 F. 2d

184, where the facts are fully stated. In both cases the error assigned was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict. In the *Moss* case this court held, as a matter of law, that plaintiff's decedent was guilty of contributory negligence, and in the *Hook* case, that the proof failed to sustain the negligence alleged in the complaint. In both cases the opinion of the court concluded thus: "The judgment is reversed." D. C., 68 F. Supp. 740. Mandates were issued in which the District Court was commanded that "such proceedings be had in the cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding."

In the District Court, after the filing of the mandates, plaintiffs made no offer to produce any evidence not before heard, but each plaintiff contended that because the judgment did not embody a direction to enter judgment for defendant a new trial should be ordered. The trial judge held that he could take no action contrary to either the letter or the spirit of the mandate, as explained by the opinion; that this court in each case had ruled that the District Court should have directed a verdict for the defendant or should have granted the motion for judgment notwithstanding the verdict. Accordingly he entered judgment in each case in favor of defendant.

We think the court correctly construed the opinions and mandates and properly disposed of appellants' contentions. *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry.*, 8 Cir., 106 F. 2d 891; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147; *Thornton* v. *Carter*, 8 Cir., 109 F. 2d 316; *Lowden* v. *Denton*, 8 Cir., 110 F. 2d 274

278; *Conway* v. *O'Brien*, 2 Cir., 111 F. 2d 611, 613; *Brunet* v. *S. S. Kresge Co.*, 7 Cir., 115 F. 2d 713; *Southern R. Co.* v. *Bell*, 4 Cir., 114 F. 2d 341; and *Herzberg's, Inc.* v. *Ocean Accident & Guarantee Corporation*, 8 Cir., 132 F. 2d 438. Compare *Madden Furniture, Inc.* v. *Metropolitan Life Ins. Co.*, 5 Cir., 127 F. 2d 837, in which case the overruling of the motion for judgment notwithstanding the verdict was not specified as error, and after the mandate had been filed, appellants offered to exhibit "evidence not before heard which might produce a different result".

Affirmed.

**Rule 50. Motion for a Directed Verdict.**

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

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No. 1070.

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JOSEPHINE M. MOSS, Administratrix of the Estate of NICHOLAS JOHN MOSS, deceased, *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

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## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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## OPINION BELOW.

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The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 21-22) is reported in 158 Fed. (2d) 86. The opinion of the District Court (R. 4-6) is reported in 68 Fed. Supp. 740.

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. 350.

## QUESTION PRESENTED.

Whether the Circuit Court of Appeals correctly construed its own mandate as directing the District Court to enter a judgment for the defendant *non obstante veredicto.*

## STATEMENT.

The petitioner Josephine M. Moss, Administratrix of the estate of Nicholas John Moss, deceased, sued the respondent herein in the United States District Court for the Northern District of Indiana to recover damages for the death of her decedent which was alleged to have been negligently caused by the respondent. At the conclusion of the petitioner's case the respondent filed a motion for a directed verdict which was overruled.[1] At the conclusion of all the evidence, the respondent again filed a motion for a directed verdict which was overruled.[2] On January 21, 1944, the jury returned a verdict for the petitioner in the amount of Seventy-five Hundred Dollars ($7500) upon which judgment was entered.[3] On January 28, 1944, the respondent, in accordance with Rule 50b of the Rules of Civil Procedure, filed a motion to set aside the verdict and the judgment and to enter a judgment for respondent in accordance with its motion for a directed verdict filed at the conclusion of all of the evidence, and in the alternative, for a new trial. These motions were denied.[4]

The respondent thereupon appealed to the United States Circuit Court of Appeals for the 7th Circuit, assigning as error, among other things, the overruling of the motion for a directed verdict and the denial of the motion for judgment

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[1] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 227.

[2] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 228.

[3] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 230.

[4] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 236.

notwithstanding the verdict.[5] On January 3, 1945, the Circuit Court of Appeals, with one judge dissenting, reversed the judgment on the ground that as a matter of law, the petitioner's decedent was guilty of contributory negligence. *Moss* v. *Pennsylvania Railroad Co.*, 146 Fed. (2d) 673. A petition for a writ of certiorari was denied by this Court on May 21, 1945, *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861.

On May 29, 1945, the mandate of the Circuit Court of Appeals for the 7th Circuit was filed in the United States District Court for the Northern District of Indiana (R. 1). The mandate of the Circuit Court of Appeals directed the District Court to award the respondent its costs and to take such further proceedings "as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding". (R. 1-2).

The respondent moved the District Court to set aside the verdict and to enter a judgment for the defendant (R. 2-3). The District Court, after hearing argument by both parties, in a memorandum opinion, dated March 4, 1946, entered judgment on the mandate in favor of the respondent (R. 4-6.) The petitioner appealed and the Circuit Court of Appeals on November 6, 1946, unanimously affirmed the action of the District Court, stating that the District Court had "correctly construed the opinions and mandate" (R. 21-22).

## ARGUMENT.

### I

The Circuit Court of Appeals did not decide any important question of Federal law that requires or deserves consideration by this Court. The only question decided by the Circuit Court of Appeals was whether its mandate had been correctly construed and applied by the District Court.

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[5] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 238-9. There were eleven assignments of error in all.

There is no dispute that the Circuit Court of Appeals in its mandate could have expressly directed the District Court to enter a judgment for the respondent. *Montgomery Ward* v. *Duncan*, 311 U. S. 243, 254; *Capital Transit Company* v. *Gamble*, U. S. Ct. of Appeals for the District of Columbia, No. 9244, decided March 10, 1947; Cf. *Cone* v. *W. Va. Pulp and Paper Co.*, No. 184, Oct. Term, 1946, decided by this Court March 3, 1947, 15 U. S. Law Week 4278.[6]

The District Court, after a hearing, concluded that the mandate of the Circuit Court of Appeals, read in the light of the opinion of that Court, directed the District Court to enter judgment for the respondent (R. 6). Upon appeal, the Circuit Court of Appeals unanimously affirmed this construction of its mandate (R. 22).

This Court said in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141:

> "* * * the Court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes."

In this case, the Circuit Court's construction of its own mandate was not inconsistent either with its own opinion or with any applicable rule of law. On the contrary, the construction of the mandate adopted by the Circuit Court of Appeals would seem to be required by its own conclusion that the petitioner's decedent had been guilty of contributory negligence as a matter of law. The Circuit Court of Appeals' construction of its mandate does not raise any general question either of substantive or procedural law, or any question with respect to the relationship between

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[6] In the *Cone* case this Court held that an appellate court could not direct the entry of a judgment notwithstanding the verdict if no motion for such a judgment had been made in the District Court within the ten-day period prescribed by Rule 50b. That question does not arise in the instant case because the respondent filed a motion for judgment within ten days after the entry of the jury's verdict. *Moss* v. *Pennsylvania Railroad Co.*, No. 1182 October Term, 1944, R. p. 230.

the appellate and the trial court that deserves decision by this Court. Compare *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *National Labor Relations Board* v. *Donnelly Garment Co.*, Nos. 38 and 39, October Term, 1946, decided by this Court on March 3, 1947, 15 U. S. Law Week, 4273.

The questions that petitioner asserts are raised by its petition all ultimately involve attacks upon the Circuit Court's construction of its own mandate. Thus the petitioner's assertion that the Circuit Court of Appeals has attempted to redelegate to the District Court the appellate court's admitted power to direct the entry of a judgment for the defendant, and the assertion that the defendant's motion for a verdict was not reinstated by the reversal, both assume that the Circuit Court of Appeals misconstrued its own mandate.

The petitioner asserts that she has been deprived of her constitutional right to a jury trial. But even if it is assumed that the Circuit Court of Appeals erroneously construed its own mandate no constitutional right of the petitioner has been infringed. The Circuit Court of Appeals could direct the entry of a judgment for the respondent without invading the petitioner's constitutional right to a trial by jury. See *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654. Furthermore, if the Circuit Court had in fact remanded the case generally, the District Court, exercising its discretion in the light of the opinion of the Circuit Court of Appeals, could have directed a judgment for the respondent without depriving the petitioner of any constitutional right. See *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654; *Cone* v. *West Virginia Pulp and Paper Co.*, No. 184, October Term, 1946, decided by this Court March 3, 1947. The error that petitioner asserts the Circuit Court committed in construing its own mandate was wholly procedural and does not raise any question of substantive law.

## II.

There is no conflict among the Circuit Courts of Appeals upon the question raised by the petition herein. Petitioner, in arguing that a conflict exists, cites *Illinois Power and Light Company* v. *Hurley,* 49 Fed. (2d) 681 (CCA 8th); *Madden Furniture Co.* v. *Metropolitan Life Insurance Company,* 127 Fed. (2d) 837 (CCA 5th); *Roth* v. *Hyer,* 142 Fed. (2d) 227 (CCA 5th); and *Fleniken* v. *Great American Indemnity Company,* 142 Fed. (2d) 938 (CCA 5th). These decisions are not in conflict with the decision of the Circuit Court of Appeals in this case. In each of those decisions a Circuit Court of Appeals, as in this case, passed upon the construction and application of its mandate that had been adopted by the District Court. The facts in each of the cases were such that the construction of its own mandate adopted by the Circuit Court of Appeals was not in any way inconsistent with the decision of the Circuit Court of Appeals in this case or with the principles followed by the Circuit Court of Appeals here in construing its mandate.

*Illinois Power & Light Company* v. *Hurley,* 49 Fed. (2d) 681, was decided in 1931 prior to the adoption of the Federal Rules of Civil Procedure. There the defendant had made a motion for a directed verdict at the close of all of the evidence. The reports indicate that no motion for judgment notwithstanding the verdict was made after the verdict had been returned and entered. See *Illinois Power & Light Company* v. *Hurley,* 30 Fed. (2d) 905, 906; 49 F. 2d 681. In those circumstances, unlike the instant case, there was no motion for judgment after the verdict which the Circuit Court of Appeals could have considered. Even had Rule 50b been in effect at that time the defendant would not have complied with its terms. Compare *Cone* v. *West Virginia Pulp and Paper Co.,* No. 184, October Term, 1946, decided by this Court March 3, 1947. Furthermore, in that case the Circuit Court of Appeals had reversed on the general ground that the evidence was insufficient to go to the jury and had not

ruled that as a matter of law plaintiff had no right to recover. The mandate of the Circuit Court of Appeals remanded the case for further proceedings in harmony with its opinion. The Circuit Court of Appeals held that the District Court had correctly interpreted the mandate as authorizing a new trial. The construction of its own mandate adopted by the Circuit Court of Appeals in that case is consistent with the construction adopted by the Circuit Court of Appeals here.

In *Madden Furniture Co.* v. *Metropolitan Life Insurance Company*, 127 Fed. (2d) 837, the plaintiff had sued the defendant on certain insurance policies. At the close of all of the evidence the defendant had moved for a directed verdict. The motion was denied and there was a verdict and judgment for the plaintiff. The defendant then moved for judgment notwithstanding the verdict and this was denied. The defendant appealed to the Circuit Court of Appeals for the Fifth Circuit *but it did not assign as error the action of the District Court in overruling the motion for a judgment notwithstanding the verdict.* The Circuit Court of Appeals for the Fifth Circuit reversed the judgment on the ground that the trial court's instructions to the jury did not correctly submit the question whether certain representations made by the insured were in fact false. *Metropolitan Life Insurance Co.* v. *Madden*, 117 Fed. (2d) 446. Upon remand, the District Court denied a motion for a new trial made by the plaintiff and entered judgment for the defendant notwithstanding the verdict. Upon appeal the action of the District Court was reversed by the Circuit Court of Appeals for the Fifth Circuit on the express ground that on the previous appeal the Court of Appeals had not considered or ruled upon the motion for judgment notwithstanding the verdict, which had not been specified as error, but had ruled only on alleged errors that had occurred prior to the verdict. *Madden Furniture Co.* v. *Metropolitan Life Insurance Co.*, 127 Fed. (2d) 837. In this case, by contrast, the overruling of the motion for judgment after the verdict was expressly

assigned as error and the Circuit Court of Appeals has held that it did pass upon that motion in its first opinion.

In *Roth* v. *Hyer,* 142 Fed. (2d) 227, the plaintiffs had sued the defendants for breach of contract. The case was tried without a jury and the District Judge gave judgment for defendants. The plaintiffs thereupon appealed to the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals reversed on the ground that the trial court had erroneously concluded that the defendants had not authorized the making of the contract by their agent. After remand to the District Court the plaintiffs moved for a summary judgment except as to the amount of damages and argued that all other issues in the case had been foreclosed by the opinion in the Circuit Court. The defendants responded by filing affidavits raising additional questions of fact with respect to the authority of the agent. The District Court held that the decision of the Circuit Court of Appeals foreclosed trial of anything but the amount of damages. Upon appeal the Circuit Court of Appeals held that this was error, pointing out that on the appeal the plaintiffs had asked the Circuit Court to direct the entry of a final judgment in its favor on the issue of liability, and that the Circuit Court of Appeals on the first appeal had denied this motion. *Roth v. Hyer,* 142 Fed. (2d) 227, 228-229. The *Roth* case, therefore, unlike this case, involved an express decision by the Circuit Court of Appeals in the first instance that it would not direct the entry of a judgment for the appellant.

In *Fleniken* v. *Great American Indemnity Company,* 142 Fed. (2d) 938, the plaintiff brought a suit for damages for personal injuries against the defendant as the insurer of the liability of a carrier. The defendant's motion for a directed verdict was overruled and the jury returned a verdict for the plaintiff upon which judgment was entered. On appeal the Circuit Court of Appeals for the Fifth Circuit held that upon the undisputed facts the insurer was not liable as a

matter of law and that its motion for a directed verdict should have been granted. Upon remand the District Court on motion of the defendant, without notice to the plaintiff, set aside the former judgment and entered judgment for the defendant on the motion for a directed verdict. Upon appeal the Court of Appeals held that this course of action by the District Court was improper. It did so, however, on the ground that it was error for the District Court to enter the judgment for the defendant without giving the plaintiff an opportunity to present objections. The Court of Appeals said, 142 Fed. (2d) 938, 939:

> "The reversal on appeal of said final judgment, ~~with a remand for said final judgment~~, with a remand for further and not inconsistent proceedings, did not reinstate the motion of defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken. *It was within the discretion of the court below to allow that motion to be renewed and to rule on it, but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial de novo.*" (Italics supplied)

In the instant case the respondent did renew its motion for judgment notwithstanding the verdict and the plaintiff was given the full opportunity to present its objections. The opinion of the Circuit Court of Appeals for the Fifth Circuit in the *Fleniken* case recognizes that had the District Court there followed the course that was followed in the instant case by the District Court the entry of the judgment for the defendant would have been proper.

The only decision by a Circuit Court of Appeals dealing with a situation at all analogous to the present case is *Herzberg's, Inc.* v. *Ocean Accident and Guarantee Corp.*, 132 Fed. (2d) 438 (CCA 8th, 1943), and that case is in accord with the decision of the Circuit Court of Appeals here. There the plaintiff had sued the defendant upon an insurance policy. The case had been tried before the District Court for the District of Nebraska without a jury. The

court had entered judgment for the plaintiff and the defendant had appealed. The Circuit Court of Appeals for the Eighth Circuit held, as a matter of law, that the loss sought to be recovered was not covered by the terms of the insurance policy and remanded the case "for further proceedings not inconsistent with the opinion" of the court. *Herzberg* v. *Ocean Accident and Guarantee Corp.*, 132 Fed. (2d) 438, 440. Upon remand, the plaintiff moved for leave to file an amended complaint and for a new trial. The lower court granted this motion and retried the case. Upon the new trial, judgment was entered for the defendant and plaintiff appealed. The Circuit of Appeals for the Eighth Circuit affirmed the judgment of the lower court and stated in its opinion that it had been error for the District Court to retry the case. The Court said, 132 Fed. (2d) 438, 440-441:

> "A majority of this Court thinks that, while the opinion and mandate on the former appeal of this case did not specifically direct the entry of judgment in favor of the defendant, the effect of the mandate, of which the opinion was a part (*Pike Rapids Power Co. Minneapolis, St. P. & S. S. M. R. Co.*, 8 Cir. 106 F 2d 891, 894), was to require that to be done, since every issue of law and fact raised by the pleadings had then been decided and nothing remained to be done except for the trial court to determine the costs that the defendant was entitled to recover and to enter judgment in favor of the defendant with costs. The majority is of the opinion that the former decision of this Court terminated this case for all purposes; that thereafter, the complaint was not subject to amendment without express leave from this Court (compare, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8 Cir. 121 F. 2d 561); and that if the amendment of the complaint had any effect at all, it constituted the commencement of a new and independent action, which, at the time the amendment was made, was barred by the statute of limitations of the State of Nebraska. The majority regards the amendment to the complaint and the proceedings subsequent thereto as an ineffectual attempt to circumvent a decision of this Court which was completely determinative of this case. This is not

a case like *Northern Pacific Ry. Co.* v. *Van Dusen Harrington Co.*, D. C. 34 F. 2d 786, 787, or *Millers' Mutual Fire Ins. Ass'n. of Illinois* v. *Bell*, 8 Cir., 99 F 2d 289, 291, in which, after a judgment of a trial court had been reversed by this Court, issues of fact remained open and a new trial was in order."

* * *

"One member of this Court thinks that the opinion and mandate of the former appeal did not require the entry of judgment for the defendant, since no such direction was contained in the mandate; that the trial court therefore had discretionary authority * * *".

It should be noted that even under the minority view expressed in that case, the trial court could have properly held, as it did in this case, that the opinion of the Circuit Court of Appeals on the controlling question of law made a new trial unnecessary.

In the *Herzberg* case the Circuit Court of Appeals for the Eighth Circuit referred to the fact that the case had been tried without a jury, but in view of the provisions of Rule 50b and the decision of this Court in *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654, the fact that no jury verdict was involved in the *Herzberg* case is not material to the point now under discussion. The case shows that if an appellate court, upon review of the whole record, decides a question of law that precludes recovery, it may properly construe its mandate as directing the entry of a judgment for the defendant, even though the mandate is expressed in general terms and contains no such specific direction.

## III.

The decision of the Circuit Court of Appeals in this case is not in conflict with the decisions of this Court, nor does it sanction departures from existing and approved procedure. Petitioner argues that it should have been granted a new trial upon remand so that it could have a second opportunity to present evidence that might make out a case that would permit recovery. The opinion of the Circuit Court of

Appeals on the first appeal in this case held that the plaintiff was barred as a matter of law from recovery because of the decedent's contributory negligence. This holding was based upon the facts with respect to the physical circumstances of the accident. In considering these facts, the Court of Appeals stated that it took "the most favorable and charitable view of deceased's action" and that it accepted "the *estimate* of plaintiff's witnesses rather than the *measurements* of defendant's witnesses." *Moss* v. *Pennsylvania Railroad Co.*, 146 Fed. (2d) 673, 677. Physical facts do not change. The petitioner in this case has not pointed to or suggested any specific evidence that she wishes to offer on the issue of contributory negligence. The record discloses that the issue of contributory negligence was fully tried on the facts in the first instance. The District Court in this case after the remand considered the plaintiff's request that she be given a new trial and decided, in view of the opinion of the Circuit Court of Appeals, that a new trial would serve no useful purpose (R. 4-5). The petitioner has had the benefit of the trial Court's judgment on the effect of the decision of the Circuit Court of Appeals on the petitioner's case and on her right to a new trial. Compare *Cone* v. *West Virginia Pulp and Paper Co.*, No. 184, October Term, 1946, decided March 3, 1947.

The trial court correctly concluded that one of the purposes of Rule 50b was to avoid unnecessary retrials when the trial court erroneously overrules a motion for a directed verdict. If, after an appellate court has held that as a matter of law the plaintiff is not entitled to recover, the plaintiff is entitled as a matter of right to a second trial, the same conclusion would appear to follow in the case of a second or third appeal. Under such a rule, litigation would be interminable.

To support its argument that the decision of the Circuit Court of Appeals departs from existing procedure and deprives petitioner of its right to a jury trial, petitioner relies heavily upon *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364. That case, which was decided in 1913, held

only that if defendant's request for directed verdict was denied without any reservation and the verdict of the jury was thus taken unconditionally and not subject to the Court's reserved ruling on the sufficiency of evidence, an appellate court could not direct the entry of a judgment for the defendant. Under Rule 50b of the Rules of Civil Procedure, it is now unnecessary for the trial court to reserve its ruling on a motion for a directed verdict. See *Montgomery Ward Co.* v. *Duncan,* 311 U. S. 243.

In *Baltimore and Carolina Line* v. *Redman,* 295 U. S. 654, this Court held, even before the promulgation of Rule 50b, that if the trial court reserved its ruling on a motion for a directed verdict and took the verdict of the jury subject to that reservation, and thereafter an appellate court held that the evidence was insufficient, the appellate court could direct the entry of a judgment for the defendant without infringing the right to a jury trial conferred by the Seventh Amendment. The Court in that case not only distinguished the *Slocum* case but expressly said that to the extent that the opinion in the *Slocum* case contained statements that were inconsistent with the result in the *Baltimore and Carolina* case, those statements "must be regarded as qualified by what is said in this opinion." *Baltimore and Carolina* v. *Redman,* 295 U. S. 654, 661.

## CONCLUSION.

For the reasons that have been stated above, it is submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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